SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0810-21

MARY LYNN MORICI,

Plaintiff-Appellant,

v.

JASON J. MILLER, ESQ. and
ROBERT T. CORCORAN, P.C.,

Defendants-Respondents.

Argued November 9, 2022 – Decided January 19, 2023

Before Judges Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-6219-18.

Kenneth S. Thyne argued the cause for appellant (Roper & Thyne, LLC, attorneys; Kenneth S. Thyne, of counsel and on the brief).

Jason S. Feinstein argued the cause for respondents (Eckert Seamans Cherin & Mellott, LLC, attorneys; Jason S. Feinstein, of counsel and on the brief).

PER CURIAM

In this legal malpractice action, we are asked to consider whether the trial court erred granting summary judgment to defendants and dismissing plaintiff's complaint after concluding her proffered expert report constituted an inadmissible net opinion. We conclude plaintiff's expert report is an inadmissible net opinion because it: 1) lacks a factual foundation; 2) articulates an incorrect standard of care; and 3) cites controlling law incorrectly. We further conclude plaintiff has failed to demonstrate her former attorney deviated from any legal standard of care in recommending the mediated settlement between the parties, where both parties relied upon a joint expert to conduct financial discovery, and affirm.

Plaintiff and Todd Morici were previously married. Todd filed a complaint of divorce against plaintiff in June 2006. At the time, Todd owned and operated businesses involving the sale of pre-owned luxury vehicles, particularly classic Ferraris. The parties retained a certified public account (CPA) as a joint forensic expert to determine the value of Todd's business, the parties' net worth, Todd's income stream from the business, and other financial issues. Todd and plaintiff reconciled, and Todd withdrew his divorce complaint in April 2007.

In June 2008, Todd filed a new complaint for divorce. Plaintiff retained defendants to represent her in the second divorce action. The parties resumed the services of the same CPA to provide joint financial discovery and jointly retained a mediator to assist in negotiating a global marital settlement agreement (MSA). After several meditation sessions, Todd and plaintiff executed a MSA on or about April 17, 2009. Plaintiff alleges she executed the MSA based on the legal advice she obtained from defendants.

At an uncontested hearing for their divorce on May 5, 2009, plaintiff asserted she had uncovered additional financial information allegedly not disclosed by Todd during the mediation. The trial court adjourned the hearing to allow the CPA to further investigate these specific financial issues raised by plaintiff.

Following the May 5, 2009 hearing, plaintiff terminated defendants' representation and hired new counsel. The joint forensic expert concluded her investigation and found there were no financial reporting discrepancies as alleged by plaintiff. Subsequently, over plaintiff's objections and with new counsel representing her, the trial court found a valid settlement had been reached and entered a final judgment of divorce incorporating the MSA. Plaintiff did not appeal that ruling.

Five years later, plaintiff filed a motion to vacate the MSA, claiming fraud by Todd and again alleging Todd concealed certain marital assets during the mediation, specifically proceeds from the sale of eleven classic cars and one closely-held stock purchased in 2001 and sold in 2015.

Plaintiff also filed a complaint alleging legal malpractice against defendants. Plaintiff and Todd elected to privately arbitrate the fraud claim and other post-divorce issues before a retired judge. At the time of the filing of the malpractice action, the arbitration was still pending. Plaintiff subsequently limited her claims at arbitration to three Ferraris and the stock. Eventually, the arbitrator dismissed plaintiff's claims for fraud, misrepresentation, and non-disclosure against Todd.

Nevertheless, and despite the dismissal of her claims against Todd, in the present action plaintiff alleges that defendants advised her "to accept a mediated settlement which did not reflect the value of [p]laintiff's claims for equitable distribution, alimony and child support." In support of her claims, plaintiff's proposed expert submitted two expert reports, opining only on the issue of equitable distribution.

Appellate courts review a trial court's grant of a summary judgment motion de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

Rule 4:46-2 provides the trial court must grant a summary judgment motion if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995). "Summary judgment should be granted . . . 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Id. at 533 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

The trial court granted summary judgment to defendants after finding plaintiff's expert report was an inadmissible net opinion. We agree.

"A legal malpractice claim is 'grounded in the tort of negligence.'" Gilbert v. Stewart, 247 N.J. 421, 442-43 (2021) (quoting Nieves v. Off. of the Pub. Def., 241 N.J. 567, 579 (2020)). "[T]he elements of a legal malpractice claim are: '(1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff.'" Ibid. (quoting Nieves, 241 N.J. at 582). A fourth element in a claim of legal malpractice is implicit in our Supreme Court's test: [(]4) "that actual damages were incurred." Cortez v. Gindhart, 435 N.J. Super. 589, 598 (App. Div. 2014) (quoting

Sommers v. McKinney, 287 N.J. Super. 1, 9-10 (App. Div. 1996)). "It is the plaintiff's burden to establish these elements 'by some competent proof.'" Gilbert, 247 N.J. at 443 (quoting Townsend v. Pierre, 221 N.J. 36, 51 (2015)).

"The net opinion rule is a 'corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Townsend, 221 N.J. at 53-54 (alterations in original) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)). "The rule requires that an expert give the why and wherefore that supports the opinion, rather than a mere conclusion." Id. at 54 (internal quotations omitted) (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)). "An expert's bare conclusions, unsupported by factual evidence, is inadmissible." Buckelew v. Grossbard, 87 N.J. 512, 524 (1981).

Plaintiff retained Scott Piekarsky as an expert in her case, who authored two reports, one while arbitration was pending and another after arbitration had concluded. Piekarsky acknowledged the factual foundation for his legal opinion was based solely on plaintiff's certification and letter brief submitted to the arbitrator. In the first report, he stated he would not be able to offer an opinion as to proximate causation until after the arbitration had concluded. In the second report, he acknowledged the arbitration had concluded and the claims of fraud

regarding the settlement agreement were found to be "without basis" by the arbitrator. Nevertheless, he opined defendants deviated from the standard of care in recommending a settlement that included equitable distribution "that was far inferior to what [plaintiff] would have obtained if she had litigated the case in [c]ourt."

The expert concluded plaintiff suffered damages from the lack of equitable distribution of the stock, using the stock's purchase date in 2001, as relayed to him by plaintiff, and its sale date in 2015, six years after the MSA was entered. He conducted no independent analysis of what the stock would have been worth on the date the original complaint was filed in 2006, which would have been the applicable valuation date for the stock. Likewise, with respect to the classic cars, the expert utilized the purchase prices of the cars and their sale amounts, relying solely on plaintiff's allegations without reference to purchase or sale receipts, to determine the value of the assets for equitable distribution, and failed to consider factors the mediator, joint forensic accountant, and arbitrator all considered. He was not even aware plaintiff had narrowed her original claim at arbitration from eleven classic cars to three, opining in his report plaintiff suffered damages as a result of "eleven or so" cars not having been equitably distributed.

The expert's reliance on plaintiff's certification and letter brief to the arbitrator as the sole evidence of the existence and value of undistributed marital assets cannot withstand scrutiny. The assets existed at some point, but the vehicles were subject to loans. Plaintiff's expert did nothing to assess the value of the vehicles, either at purchase, on the applicable valuation date in 2006, or at sale, net of their loans. Importantly, both parties agreed at mediation Todd's income stream, the primary source of funds used to pay marital expenses during the marriage, was derived solely from surplus after the sale of the cars, net of loans. During the summary judgment application, the trial court carefully examined Piekarsky's opinion and noted the cars at issue were all subject to loans, which were to be subtracted from the sale prices to determine whether any equity existed, and the parties had jointly agreed all of Todd's income came from the sale of cars after loans were paid. Thus, the joint financial expert had determined that income from the sale of the cars had been utilized during the marriage to pay regular marital expenses, leaving nothing to equitably distribute.

Plaintiff's expert also articulated the incorrect standard of care. Piekarsky was required to opine as to an amount plaintiff would have received in a reasonable settlement had defendants not deviated from the standard of care, not

what plaintiff would have received after trial. Kelly v. Berlin, 300 N.J. Super. 256, 264 (App. Div. 1997). Instead, he concluded:

> By recommending a settlement that did not take into account the equitable distribution of these assets. . . the [d]efendants deviated from the standard of care and proximately caused the [p]laintiff damages. The damages proximately caused by such deviation was one-half of the assets that were not equitable [sic] distributed, along with an award of interest and loss of use of these funds and the counsel fees [p]laintiff's counsel will be entitled to for litigating the legal malpractice case, along with any costs in said case.

We agree with the court that the expert "did not give an opinion opining as to the reasonableness of a settlement as compared to what kind of settlement plaintiff should have received in this case."

Finally, we also conclude plaintiff's expert report cites the law of equitable distribution incorrectly. Piekarsky's report, relying on N.J.S.A. 2A:34-23.1 and Overbay v. Overbay, 376 N.J. Super. 99, 114 (App. Div. 2005), states: "Given the length [of the marriage] in this matter and the fact that it was a traditional marriage, equitable distribution would have been based upon a 50/50 [split] of the marital assets."

In Overbay, we did not hold that equitable distribution requires the fifty-fifty split of assets; rather we affirmed the trial court's finding after it considered all of the statutory factors of N.J.S.A. 2A:34-23.1. Overbay, 376 N.J. Super. at

114. This does not imply that equitable distribution requires a fifty-fifty split of all marital assets as plaintiff's expert claims. On the contrary, we have consistently held "equitable distribution does not presume an equal distribution." M.G. v. S.M., 457 N.J. Super. 286, 295 (App. Div. 2018) (quoting Rothman v.Rothman, 65 N.J. 219, 232 n.6 (1974)).

In considering equitable distribution, Rothman, 65 N.J. at 232 is instructive:

> Assuming that some allocation is to be made, [the trial judge] must first decide what specific property of each spouse is eligible for distribution. Secondly, he must determine its value for purposes of such distribution. Thirdly, he must decide how much allocation can most equitably be made.

It is clear from Rothman that a fifty-fifty, formulaic approach is not the presumptive starting point; each analysis varies depending on the facts of a specific case. N.J.S.A. 2A:34-23.1 sets forth the sixteen statutory factors that must be considered. See J.S. v. L.S., 389 N.J. Super. 200, 203 (App. Div. 2006) ("N.J.S.A. 2A:34-23.1 lists sixteen factors to be considered in making equitable distribution provisions . . . ."). The philosophy underscored in the statute is based upon a partnership concept in which both parties contributed to the accumulation of marital assets, although rarely in equal measure, particularly with respect to one party's business. The expert's bald conclusion that plaintiff

would have received fifty percent of all marital assets in equitable distribution lacks any basis in law.

Any one of the expert's failures, alone, would render the report inadmissible. Together, they wholly support the trial court's order granting summary judgment to defendants and dismissing the legal malpractice action.

To the extent we have not addressed them, any remaining arguments raised by plaintiff lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e (1)(E).

Affirmed.